

IN THE HIGH COURT OF BOMBAY AT GOAWRIT PETITION NO.463 OF 2003

1. M/s South Konkan Distilleries,
a partnership firm constituted and
registered under the Indian
Partnership Act, with its office
at Virginkar Bldg.,
Opp. Rajendra Prasad Stadium,
Navelim, Margao, Goa.
 2. Shri Shivdas Gajanan Naik,
s/o Gajanan Naik, of major age,
businessman, residisng above
Goa Liquor Industries,
Khareband Rd., Margao, Goa.
- ... Petitioners.

Versus

1. Shri Prabhakar Gajanan Naik
s/o Gajanan Naik, major in age,
businessman, with office at
Near Railway Gate, Navelim,
Margao, Goa.
 2. Shri Premanand Gajanan Naik
s/o Gajanan Naik, of major age,
businessman, residing above Goa Liquor
Industries, Khareband Rd., Margao, Goa.
 3. Shri Satchit Gajanan Naik,
s/o Gajanan Naik, of major age,
businessman, residing above Goa Liquor
Industries, Khareband Rd., Margao, Goa.
 4. Shri Tulshidas Gajanan Naik,
s/o Gajanan Naik, of major age,
businessman, with office at
Naik Trading Corp., Near Railway
Gate, Margao, Goa.
- ... Respondents.

Mr. S.K. Kakodakar, Senior Advocate, with Advocate S. G. Bhobe, for the petitioner.

Mr. S. D. Lotlikar, Senior Advocate, with Advocate Ryan Menezes for the respondent no.1.

Mr. Kamat, Advocate for the respondent no.4.

CORAM : DR. S. RADHAKRISHNAN, J.

DATE : OCTOBER, 20 2006.

ORAL JUDGMENT :

1. By this petition, the petitioners being the original defendant no.1 and 4 have sought to challenge the Judgment and Order of the Trial Court dated 5.2.2001 whereby the Trial Court had rejected the application for amendment of the written statement of defendant no.1 and 4 in particular the counter claim filed therein.

2. The brief facts are that one Prabhakar Gajanan Naik had filed a suit for dissolution of partnership firm wherein the petitioner no.1 being the defendant 1 is the partnership firm and petitioner 2 being a partner of the said partnership firm. In the said suit for dissolution of partnership, the present petitioners by their written statement disputed the existence of such partnership and took a plea that by way of a family arrangement defendant no.1 and 4 were solely allowed to carry on the business setting up of South Konkan Distilleries. In the said written

statement, the petitioners being defendant no.1 and 4 also claimed that in view of various letters addressed by the original plaintiff to various Banks, the petitioners suffered loss in sense the said Distilleries could not be commenced as scheduled in May 1986 and as a result the petitioners suffered heavy loss. Accordingly in the said written statement the counter claim of Rs. 52 lakhs was made against the original plaintiff when the written statement was filed on 17.6.1987. The said counter claim is based on the Advocate's Notice dated 23.10.1986. The details of the counter claim of the said Rs.52 lakhs are as under :-

Details of Counter-Claim of Rs. 52 lakhs worked out at the time of filing of the Counter-Claim.

Loss on account of non-commissioning of plant on schedule time (para) (i) of letter dated 23.10.1986)	25,00,000.00
Loss on account of Income Tax liability because of non-availability of depreciation (para (ii) of letter dated 23.10.1986.	8,00,000.00
Loss on account of physical, illegal seizure of books and blockade of bank account (para (iii) of letter dated 23.10.1986.	4,00,000.00
Loss on account of writing letters and telegrams to customers (para (iv) of letter dated 23.10.1986.	5,00,000.00
Loss on account of stoppage of trading activities and bank account at Bombay (para (v) of letter dated 23.10.1986.	5,00,000.00

Escalation in price of machinery (para
(vi) of letter dated 23.10.1986)

5,00,000.00

52,00,000.00

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3. The petitioners thereafter filed an amendment application in the year 2000 to further amend the said counter claim seeking enhanced amount as under:-

Details of Enhanced Counter-Claim as presently worked out.

Loss on account of non-commissioning
of plant till date. Plant expected to be
commissioned in May, 1986 (para (i)

Loss @ Re. 1/- per litre calculated on 20,000
litres per day assuming that the plant works
for nine months in a year. Number of years
from June, 1986 till November, 2000 works
out to 14 years 6 months, i.e.

(14 years x 9 months
x 30 days x 20,000) +
(4.5 months x 30 days
x 20,000) 7,83,00,000.00

(Note: 4.5 months taken into
reckoning instead of six
months since 9-months
production cycle is assumed.

Less: Originally claimed 25,00,000.00

7,58,00,000.00

Loss on account of repairs maintenance
and obsolescence

8,00,000.00

7,66,00,000.00

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Loss on account of non-availability of depreciation and tax effect of it.	26,00,000.00	
Less: Already claimed.	8,00,000.00	
	-----	18,00,000.00
Loss of account of denial of subsidy by Government		17,50,000.00

		8,01,50,000.00
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4. To put it in other words, the petitioners had contended that they are suffering a loss of Rs.20,000/- per day from the month of June 1986 and when the original written statement was filed, the counter claim was made only upto the date of filing of the said written statement and now by this amendment they are seeking to claim a sum of Rs.20,000/- per day right from June, 1986 till November, 2000, less Rs.25 lakhs.

5. With regard to the aforesaid amendment application, the respondent no.1 herein being the original plaintiff opposed the same on the ground that the proposed amendment was clearly barred by law of limitation. The learned Judge by the impugned order dated 5.2.2001 after setting out brief facts also came to the conclusion that as the cause of action arose in 1986 and the present amendment for counter claim for enhanced damages was clearly ex facie barred by law of limitation.

6. The learned Senior Counsel appearing on behalf of the petitioners Mr. Kakodkar contended that as far as amendment application is concerned, the Court should be extremely liberal in granting the same otherwise irreparable loss will be caused to the petitioners.

7. In that behalf, Mr. Kakodkar referred to paragraph 8 of the Supreme Court Judgment in ***Baldev Singh and others v/s Manohar Singh and another (2006) 6 SCC 498***. There is no dispute about the aforesaid proposition of law that the Court should be extremely liberal in granting amendment application.

8. Mr. Kakodkar thereafter referred to another judgment of the Supreme Court in ***Pankaja & another v/s Yellappa (D) by L.Rs & others 2005(2) Bom.C.R.273*** wherein in paragraph 14 the Supreme Court has observed that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. The Court has further observed, that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. In the same judgment in paragraph 15 the Supreme Court had referred to an earlier Judgment in Supreme Court in ***L.J. Leach and Co.Ltd. and another v/s Messrs. Jardine Skinner & Co) AIR 1957 SC 357*** and the said paragraph 15 reads as under :-

“It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it if that is required in the interests of justice.”

9. Mr. Kakodkar thereafter referred to a well known Judgment of the Supreme Court in ***Ragu Thilak D. John v/s S. Rayappan and others (2001) 2 SCC 472*** wherein in paragraph 6, the Supreme Court has observed if the issue is whether the amendment was barred by time is arguable in the facts and circumstances of the case, such an amendment ought not to be rejected and the issue of limitation can be made an issue in the suit itself.

10. Mr. Kakodkar thereafter referred to another judgment of Supreme Court in ***Vishwambhar and others v/s Laxminarayan (dead) through Lrs and another. (2001) 6 SCC 163*** wherein the Supreme Court has held clearly that the amendment though properly made cannot relate back to the date of filing of suit, but to the date of the application.

11. Mr. Kakodkar also referred to the judgment of the learned Single Judge of this Court in ***Lok Housing and Constructions Ltd., and another v/s Everest Industries Ltd. And Nirmal Lifestyles Ltd., (2005(2) Mh.L.J.*** wherein this Court has stated that the Court should be liberal to grant amendment to avoid multifariousness of proceedings.

12. Mr. Kakodkar also referred to the judgment of Supreme Court in ***C.S. Company and others v/s Kerala State Electricity Board (1996) 11 SCC 680*** wherein the Supreme Court has observed in paragraph 3 that the amendment could be granted in that case since the original suit was for settlement of accounts and now instead of the same the plaintiff had sought the relief of damages.

13. Mr. Kakodkar thereafter referred to another judgment of Supreme Court in ***Suraj Prakash Bhasin v/s Smt. Raj Rani Bhasin and others AIR 1981 SC 485***, wherein certain amendment was made after lapse of 2 years was granted.

14. Mr. Kakodkar referred to a judgment of Supreme Court in ***Vineet Kumar v/s Mangal Sain Wadhera AIR 1985 SC 817*** wherein in paragraph 16, the Supreme Court has clearly held that if a amendment merely adds to facts already on record, the amendment would be allowed even after statutory period of limitation.

15. Mr. Kakodkar also referred to a judgment of Supreme Court in ***Shikharchand Jain v/s Digamber Jain Praband Karini Sabha and others AIR 1974 SC 1178*** wherein it was held that the amendment can be allowed to record subsequent change of circumstances which are necessary to be taken note of in order to shorten litigation.

16. Finally Mr. Kakodkar referred to a well known judgment of the Supreme Court in ***Surya Dev Rai v/s Ram Chander Rai and others (2003) 6 SCC 675*** wherein in paragraph 38 the Supreme Court lays down the scope of exercise of power under Article 226 and 227 of the Constitution of India.

17. Mr. Kakodkar therefore submitted that in the instant case, the amendment ought to have been allowed and the Trial Court has committed a manifest error in declining the same. He pointed out that the issue of the limitation can also be kept open so as to enable respondent no.1 to agitate the same and the amendment ought not to have been rejected solely on the ground of limitation. He submitted that non grant of amendment would cause irreparable loss and injury to the petitioners and this Court ought to interfere with the same, and render justice.

18. Mr. Lotlikar, Senior Counsel appearing on behalf of the respondent no.1 pointed out that in the instant case even in the original counter claim which was filed alongwith with written statement on 17.6.1997, the basis of the claim was loss of Rs. 20,000/- per day from June 1986 and the amount of damages were computed in the said counter claim at Rs.25 lakhs and in addition thereto certain other amounts were claimed like loss on account in income tax liability, loss on account of illegal seizure of books and blocking Bank account, etc.

19. Mr. Lotlikar, Senior Counsel pointed out that by the present amendment what is sought to be claimed is the same loss which was very much available to them at the time when the original counter claim was filed. However, the petitioners chose to claim only upto a particular period and not beyond that. Even presently Mr. Lotlikar, Senior Counsel pointed that the enhanced counter claim on the ground of alleged loss of Rs.20,000/- is claimed only upto November 2000 and not subsequent thereto. Mr. Lotlikar, Senior Counsel points out that the petitioners themselves contended that the cause of action for the said claim arose somewhere in June 1986 if that be so the additional claim could have been very well been claimed at that time clearly mentioning from month to month certain amount of compensation ought to be paid.

20. Mr. Lotlikar, Senior Counsel pointed that this is a clear

attempt to delay the proceedings which has been pending for last almost 20 years. The learned Senior Counsel also pointed out that the petitioners have not claimed damages from December 2000 onwards.

21. Mr. Lotlikar, Senior Counsel contended that the claim is ex facie barred by law of limitation and there is no question of arguable issue regarding bar by law of limitation. The present application, Mr. Lotlikar, Senior Counsel pointed out is being filed almost after thirteen and half years after the written statement cum counter claim being filed and there is absolute no reason given regarding the delay.

22. In that behalf, Mr. Lotlikar, Senior Counsel referred to a judgment of the Supreme Court Union of India v/s Pramod Gupta (Dead) by Lrs and others (2005) 12 SCC wherein in paragraph 135 the Supreme Court has observed as under :-

“135. Delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings. The High Court neither assigned sufficient or cogent reasons nor applied its mind as regards the relevant factors while allowing the said application for amendment. It has also not been taken into consideration that the application for amendment

of pleadings might not have been maintainable in view of statutory interdict contained in sub-section (2) of Section 25 of the Act, if the same was applicable.”

23. Mr. Lotlikar, Senior Counsel thereafter pointed out that the Trial Court has rightly exercised its discretion in not granting the said amendment as the same was clearly barred by law of limitation and also he submits that there is no perversity and arbitrariness in the impugned order.

24. Mr. Lotlikar, Senior Counsel also submits that as the amendment was ex facie barred by limitation and after taking into account all relevant facts and considering that the amendment application was moved after thirteen and half years and after filing written statement and counter claim, the Trial Court had rejected the same. Mr. Lotlikar, Senior Counsel contended that admittedly there is no explanation also with regard to delay of thirteen and half years. He also contended that this is a malafide application merely to protract the suit by way of dilatory tactics.

25. Mr. Kamat learned Counsel appearing on behalf of respondent no.4 also strongly supported Mr. Lotlikar, Senior Counsel and contended that the written statement contains lot of false statements

and the entire basis of the claim itself is fraudulent.

26. After hearing both the learned Senior Counsel and Counsel for the respondent no.4, there is no doubt that the Court ought to be extremely liberal in granting the amendment and specially to avoid multifariousness of proceedings.

27. However, in the instant case it is very clear that the claim made by the petitioners by way of amendment is ex facie barred by law of limitation as the same has been made after a lapse of thirteen and half years. This is not a case of merely a claim of settlement of account and thereafter seeking a claim of damages. The petitioners were fully aware when they filed the above amendment application, however chose to restrict the claim only upto a particular period i.e. upto November 2000.

28. As far as the Judgment of the Supreme Court in Baldev Singh case, there is no doubt this Court should be extremely liberal in granting the amendment provided the same is within a period of limitation or there should be an arguable case with regard to limitation. In the instant case, there is absolutely no arguable case in respect of limitation. Similarly even in Pankaja v/s Yellappa case, the amendment was granted because the issue of limitation was an arguable one. As rightly held in Ragu Thilak v/s Rayappan case, a plea with regard to an amendment

being barred by limitation, if it is arguable then the same can be allowed to avoid multiplicity of litigation. However in the instant case ex facie the amendment claim is barred by limitation, the same cannot be entertained. In fact the judgment referred to by Mr. Kakodkar in Vishwambhar v/s Laxminarayan also clearly held that even if the amendment is granted it does not save limitation.

29. In the case of C.S. Company and other v/s Kerala State Electricity Board, the Supreme Court found the amendment ought to be granted since it was only a suit for settlement of accounts and the amendment was only for damages. Whereas in the instant suit is for damages now after thirteen and half years further sum is sought to be claimed which is clearly impermissible as it is barred by limitation.

30. As far as the judgment of Supreme Court in Suraj Prakash v/s Smt. Raj Rani Bhasin is concerned, the amendment was granted after a delay of about two years. In a the similar manner the Vineet Kumar v/s Mangal Sain the Supreme Court held that merely adding facts which are already on record the amendment would be allowed even after a period of limitation. In the instant case, it cannot be said that the case of only adding facts. The judgment in the Supreme Court Shikharchand v/s S.J.P. Karini case will not be assistance to the petitioners.

31. It would not be out of context to refer to the judgment of Supreme Court in ***L.J. Leach and Co Ltd., and another v/s Messrs. Jardine Skinner & Co. AIR 1957 SC 357*** wherein in no uncertain terms, the Supreme Court has held that the Court would, as a rule, decline to allow amendments if a fresh suit on the amended claim would be barred by limitation on the date of the application.

32. Under the aforesaid facts and circumstances, I do not find any jurisdictional error committed by the learned Trial Court Judge or any manifest error in wrongly not exercising the discretion in granting the said amendment. The said amendment is ex facie barred by law of limitation, hence the same was rightly rejected by the learned Trial Court Judge.

33. The petition is totally devoid of merits. Hence Rule stands discharged with costs.

34. Having regard to the facts and circumstances of the case, especially suit has been pending for trial for the last 20 years, the learned Trial Judge is directed to dispose of the suit expeditiously, preferably within a period of six months from today.

DR. S. RADHAKRISHNAN, J.